

<sup>1</sup>Defendants move only that the “Report” and its exhibits be struck from the record, not the plaintiffs’ request for attorneys’ fees. Defendants intend to file their response and objections to the fee request on or before December 14, 2004, in accordance with the Court’s February 5, 2003 Order at 30.

A proposed order accompanies this Motion and the Memorandum of Points and Authorities.

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

STUART E. SCHIFFER  
Deputy Assistant Attorney General

MICHAEL F. HERTZ  
Director

/s/ Tracy L. Hilmer  
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D.C. Bar No. 425194  
Tracy L. Hilmer  
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Attorneys  
Commercial Litigation Branch  
Civil Division  
P.O. Box 261  
Ben Franklin Station  
Washington, D.C. 20044  
(202) 307-0474

DATED: November 29, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on November 29, 2004 the foregoing *Defendants' Motion to Strike Plaintiffs' "Report" Regarding the Erwin Scheduling Matter* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
Fax (406) 338-7530

/s/ Kevin P. Kingston  
Kevin P. Kingston

<sup>1</sup>Accompanying the “Report” is a claim for an astonishing \$162,761.52 in attorney’s fees. We do not move to strike the fee request, but rather intend to address it separately on or before December 14, 2004, in accordance with the Court’s February 5, 2003 order at 30.

burdensome for her to be deposed before January 6, 2003. The Court held a hearing on the matter on December 13, 2002. A misunderstanding between government counsel and Donna Erwin and her staff resulted in inaccurate information concerning Ms. Erwin's plans to be in Washington, DC prior to January 6, 2003 being given to the Court at the December 13 hearing. As a result, the Court ordered Ms. Erwin to submit to deposition the week following the December 13 hearing in Albuquerque, New Mexico, where she resided. Following a subsequent hearing before the Court on December 17, 2002 at which government counsel attempted to explain the misunderstanding regarding Ms. Erwin's schedule, Ms. Erwin was deposed by plaintiffs in Washington, DC on December 20, 2002. Ms. Erwin was not called to appear in person as a witness by either side at Trial 1.5.

Plaintiffs had agreed to conclude Ms. Erwin's December 20, 2002 deposition by 4:30 pm so that Ms. Erwin could make her flight back to Albuquerque. Dec. 20, 2002 Erwin Dep. at 4 (Exhibit A). Shortly before 4:30, after having apparently concluded their questioning of Ms. Erwin regarding Trial 1.5 issues, plaintiffs' counsel asked Ms. Erwin regarding the December 13 and 17, 2002 hearings: "And you believe your attorneys have been fully truthful with the Court?" *Id.* at 284. Government counsel asserted a privilege and, after a conference with Ms. Erwin, directed her not to answer the question. Plaintiffs filed a motion to compel Ms. Erwin to answer the question. The Court granted the motion. The Court also awarded plaintiffs sanctions for reasonable attorney's fees and costs incurred in presenting the motion to compel and in re-deposing Ms. Erwin upon the matter she had been directed not to answer. *Cobell v. Norton*, 213 F.R.D. 16, 32-33 (D.D.C. 2003). The Court did not in that order or subsequently authorize or direct the plaintiffs or anyone else to file a "report" regarding the Erwin scheduling matter.

Ms. Erwin retained personal counsel and submitted to re-deposition on February 12 and 13, 2003. She was re-deposed again on October 14, 2004, pursuant to the Court's September 2, 2004 Memorandum and Order at p. 7 ("Sept. 2, 2004 Order").

### Argument

In filing this “Report,” absent an order of the Court, plaintiffs have assumed the mantle of a special master or a special prosecutor – positions they, as interested parties in this litigation, are legally ineligible to hold. *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 807 (1987) (plaintiff’s counsel was ineligible to serve as special prosecutor of alleged criminal contempt); *Jenkins v. Sterlacci*, 849 F.2d 627, 630-32 & n.1 (D.C. Cir. 1988) (ethical restrictions of 28 U.S.C. § 455 apply to a special master), cited with approval in *Cobell v. Norton*, 334 F.3d 1128, 1144 (D.C. Cir. 2003). Plaintiffs do not expressly specify the purpose of the document, but the opening sentences of the “Report” level charges of unethical and even criminal conduct by various government attorneys and officials. “Report” at 2. Thus, it is apparent that plaintiffs’ unstated purpose in submitting this “Report” is to instigate some sort of criminal or disciplinary proceeding against the named attorneys and officials. Plaintiffs do not state under what authority they purport to submit their “findings”, but no order of this Court and no rule of procedure has authorized them to undertake the role of investigator or prosecutor.

The Court did not appoint plaintiffs to serve in such a role. Indeed, the Court refused to permit the plaintiffs to depose the government’s counsel in connection with the Erwin scheduling issue in part because it found: “Any deposition of defendants’ trial counsel would appear to be directed only at uncovering facts useful for the prosecution of criminal contempt. Plaintiffs are ineligible to undertake such an investigation.” Sept. 2, 2004 Order at 4-5. The Court’s September 2, 2004 ruling was therefore consistent both with *Young* and with the Court of Appeals’ holding that district courts are not empowered to appoint agents to function in “an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system.” *Cobell v. Norton*, 334 F.3d at 1142. Plaintiffs’ counsel, however, have clearly decided to ignore the holdings of the Court of Appeals and this Court in their continuing unsavory effort

to accumulate attorneys' fees and tarnish the reputations of defendants and their counsel.<sup>2</sup>

Submission of the "Report" violates the principles set forth by the Supreme Court in *Young*, and by the Court of Appeals and this Court in this very case. Indeed, the bias that is evident in plaintiffs' "Report" perfectly illustrates the reason why the Supreme Court refused to allow a party in a civil case to serve as a special prosecutor regarding alleged misconduct of its adversary.

Further, even if plaintiffs were not ineligible to pursue criminal sanctions, the "Report" is procedurally defective. It is not a motion or any other type of pleading recognized by the Federal Rules of Civil Procedure. The "Report" is entirely improper and should therefore be struck from the record.

If, despite the authorities cited above, the Court determines that it will entertain plaintiffs' "Report" on the merits, defendants respectfully request 30 days from the Court's ruling upon this motion to strike for responses to be filed to the "Report." Such time would be necessary to make a substantive response because the "Report" is not only lengthy, but also based upon a biased and incomplete selection of portions of the depositions and documents pertaining to the Erwin scheduling issue.

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

STUART E. SCHIFFER  
Deputy Assistant Attorney General

MICHAEL F. HERTZ  
Director

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<sup>2</sup>Although plaintiffs' accuse their opposing counsel of "once more flouting their ethical obligations", Report at 2, it must be noted that referrals of the government's current defense counsel to the Disciplinary Committee of the Bar of the District Court for other matters related to this litigation have resulted in findings that no further proceedings were warranted.

/s/ Tracy L. Hilmer  
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Washington, D.C. 20044  
(202) 307-0474

DATED: November 29, 2004



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, *et al.*,

Plaintiffs,

v.

BRUCE BABBITT, Secretary of the  
Interior, *et al.*,

Defendants.

No. 1:96CV01285 RCL

Washington, D.C.

December 20, 2002

DEPOSITION OF:

DONNA ERWIN,

called for examination by counsel for the plaintiffs,  
pursuant to notice of subpoena, in the law offices of  
Kilpatrick and Stockton, 607 Fourteenth Street, N.W.,  
at 10:30 a.m., when were present on behalf of the  
respective parties:

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

EXHIBIT A

Defendants' Memorandum of Points and  
Authorities in Support of Their Motion to  
Strike Plaintiffs' "Report" Regarding the  
Erwin Scheduling Matter

[www.nealrgross.com](http://www.nealrgross.com)

P-R-O-C-E-E-D-I-N-G-S

(10:35 a.m.)

Whereupon,

DONNA ERWIN

was called as a witness by counsel for the plaintiffs and, having been first duly sworn, was examined and testified as follows:

MR. BROWN: Good morning, Ms. Erwin. My name is Mark Brown. I am one of the attorneys for the plaintiffs. I apologize for our late start here. You need to catch a plane and be out of here at 4:30. Is that right?

THE WITNESS: Yes.

MR. BROWN: All right. We are going to do our best to accommodate you.

MS. SPOONER: We really appreciate that.

Can I have a moment to put a couple of things on the record?

MR. BROWN: Sure.

MS. SPOONER: First is to thank you for agreeing to start earlier, although I know that wasn't the detail there, and for agreeing to let Ms. Erwin

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1 THE WITNESS: Yes.

2 By MR. BROWN:

3 Q And you believe your attorneys have been  
4 fully truthful with the Court?

5 MS. SPOONER: I'm going to object on that  
6 on the grounds that it's protected by the attorney-  
7 client privilege.

8 MR. BROWN: It can't possibly be.

9 MR. KIEFFER: It's her belief she has  
10 about her attorneys. It's not whether her attorney  
11 said --

12 MS. SPOONER: Yes, except that we've had  
13 a number of discussions about that and I don't  
14 believe, as with Ms. Skobell, when Mr. Gingold made  
15 objections that she can properly separate her  
16 discussions with her attorneys from her beliefs.

17 MR. GINGOLD : We're dealing with a  
18 finding by the Court that Ms. Erwin deliberately  
19 deceived the Court. That's a finding of fraud with no  
20 exceptions to privilege to the extent it exists  
21 applies here in the --

22 MS. SPOONER: Absolutely not. I'm

**NEAL R. GROSS**

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1 THE WITNESS: No.

2 MR. BROWN: Who is your personal counsel?

3 THE WITNESS: I am just in the process of  
4 discussing with someone.

5 MR. BROWN: So you have not obtained  
6 personal counsel?

7 THE WITNESS: I've not obtained personal  
8 counsel. I am in the process.

9 MR. BROWN: Okay. Ms. Erwin, don't you  
10 have the opportunity to do that.

11 MS. SPOONER: Ms. Erwin has to go. It's  
12 now 4:37 by my clock.

13 MR. BROWN: Well, we've taken that break,  
14 so I want to finish that line of questions.

15 MS. SPOONER: We were 5 minutes on that  
16 break. It's now 4:38 by my clock.

17 MR. BROWN: Are you instructing her not to  
18 answer any further questions?

19 MS. SPOONER: What other lines of  
20 questioning do you have?

21 MR. BROWN: We're going to find out.

22 MS. SPOONER: No, given those certain

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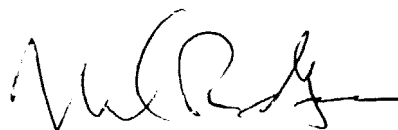
CERTIFICATE

This is to certify that the foregoing proceedings in the  
matter of:                   The Deposition of  
                                  DONNA ERWIN

held on:                    December 20, 2002,

at the location of: 607 - 14th Street, NW,  
                                  Washington, DC,

were duly recorded and accurately transcribed under my  
direction; further, that said proceedings are a true and  
accurate record of the testimony given by said witness; and  
that I am neither counsel for, related to, nor employed by  
any of the parties to this action in which this deposition  
was taken; and further that I am not a relative nor an  
employee of any of the parties nor counsel employed by the  
parties, and I am not financially or otherwise interested in  
the outcome of the action.



Notary Public/Reporter in and for  
the District of Columbia.

My commission expires

March 31, 2006.

ELOUISE PEPION COBELL, et al.,  
Plaintiffs,  
  
v.  
  
GALE NORTON, Secretary of the Interior, et al.,  
Defendants.

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Case No. 1:96CV01285  
(Judge Lamberth)

Upon consideration of *Defendants' Motion to Strike Plaintiffs' "Report on the Status of the Evidence Concerning Defendants' and the Department of Justice's Misrepresentations to this Court on December 13 and December 17, 2003[sic]"* (filed Nov. 15, 2004), and the entire record in this case, it is this                  day of                  , 2004, hereby

FURTHER ORDERED that *Plaintiffs' "Report on the Status of the Evidence Concerning Defendants' and the Department of Justice's Misrepresentations to this Court on December 13 and December 17, 2003[sic]"* (filed Nov. 15, 2004) and the exhibits thereto be struck from the record in this case.

Hon. Royce C. Lamberth  
UNITED STATES DISTRICT JUDGE  
United States District Court for the  
District of Columbia

cc:

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